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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LINDA L. DOWDY, etc. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

CRE VENTURE 2011-2, LLC,

Real Party in Interest.

D074301

(San Diego County Super. Ct.
No. 37-2014-00003562-CU-BC-CTL)

ORIGINAL PROCEEDINGS in mandate after the superior court entered a contempt order against petitioners. Randa Trapp, Judge. Petition granted.

Witham Mahoney & Abbott and Matthew M. Mahoney for Petitioners.

No appearance for Respondent.

Browne George Ross and Keith Joseph Wesley for Real Party in Interest.

In a prior appeal, this court upheld a March 2016 judgment concluding the plaintiff had the right to enforce a security interest after defendants defaulted on a loan

agreement. (*CRE-Venture 2011-2 v. Dowdy* (Jul. 11, 2017, D070549) [nonpub. opn.] (*CRE I*)). After the remittitur issued, the parties vigorously disputed the manner in which the plaintiff could enforce its security interest. The trial court ultimately issued an order modifying the final judgment nunc pro tunc, and finding defendants in contempt of this order and the modified judgment. (See Code Civ. Proc., §§ 1209, subd. (a)(5), 1218, subd. (a).)¹ As contempt sanctions, the court imposed a conditional \$96,000 fine, and found plaintiff was entitled to recover its attorney fees (in an amount to be determined at a later hearing).

Defendants filed a writ petition challenging the contempt order, the sanctions amount, and the attorney fees order, and we issued an order to show cause. We determine the trial court erred in granting the contempt motion because (1) the contempt order was based on a violation of the nunc pro tunc judgment, and the court had no authority to enter that judgment; and (2) there was no showing defendants violated a clear, specific, and unequivocal order informing them what they were required to do to comply with the judgment. We thus direct the court to vacate the contempt order and the associated penalties and attorney fees.

This conclusion does not limit the court's authority to enforce the March 2016 final judgment. On a proper record and under appropriate procedural mechanisms, the court may issue orders fully enforcing the judgment and award reasonable attorney fees

¹ All further statutory references are to the Code of Civil Procedure.

incurred during enforcement proceedings. If defendants violate specific provisions in these orders, they may be subject to contempt sanctions and attorney fees.

FACTUAL AND PROCEDURAL SUMMARY²

Background

In 2008, a bank loaned \$2 million to Gateway Capitol Group, LLC (Gateway), secured by residential property (the Robinson home). At the time, Gateway's limited liability members included three family trusts (collectively Trusts). Scott Robinson (one of the trustees of one of the Trusts) was Gateway's manager.

During the next several years, the bank agreed to loan additional amounts to Gateway. As part of one loan modification, the trustees of the three Trusts (Pledgors³) agreed to provide additional security by executing a "Pledge and Security Agreement" (Pledge Agreement). In this Pledge Agreement, Pledgors agreed to convey to the bank a security interest in "Collateral," defined as "All right, title and interest in and to all of the membership interests in Gateway . . . , a California limited liability Company (collectively, the '*Interests*'), together with dividends, distributions, cash or cash equivalents, and any and all other equivalents, now or in the future, arising from the Interests." (Bolding omitted.)

² A full description of the underlying facts is contained in our prior opinion, *CRE I*, *supra*, D070549. We state only those facts necessary to resolving the issues before us.

³ Pledgors (trustees) are Scott B. Robinson, Susan B. Robinson, and Linda L. Dowdy. (See *CRE I*, *supra*, D070549, at p. 2, fn. 1.)

In this Pledge Agreement, Pledgors "*represent[ed] and warrant[ed] that [they] own[] all of the Pledged Collateral*"; that they had the "*right to execute this Agreement*"; "that this Agreement *does not violate any of the provisions of the Articles of Organization, Operating Agreement or any other agreement affecting [Gateway]*"; and Pledgors have "*the authority to grant the security interests*" in the Collateral. (Italics added.) Pledgors also agreed they would not (without consent) "assign or transfer any membership interest in" Gateway and that they would continue to "*be the sole members and manager of [Gateway]*." (Italics added.) The Pledge Agreement also stated: "Pledgor hereby pledges, hypothecates, assigns, transfers, sets over and delivers to [the lender] a security interest in and to the Collateral and all net profits, dividends, cash, distributions, instruments and other property from time to time received, receivable or otherwise distributed in respect of or in exchange for any or all of such Collateral"

A related document, entitled Change in Terms Agreement, signed by Scott Robinson as Gateway's manager, agreed that *Gateway as the borrower* was "hypothecat[ing its] ownership interest . . . as additional collateral."

In February 2014, the bank's successor, CRE Venture 2011-2, LLC (CRE), filed a superior court action against Gateway and Pledgors, seeking to recover unpaid loan amounts and/or to enforce its security interests. CRE also sued Scott Robinson in his individual capacity.

In April 2014, CRE conducted a nonjudicial foreclosure sale of the Robinson home. After clearing about \$1 million from this sale, CRE claimed a remaining \$4.5 million deficiency on the loan or loans.

CRE then dismissed Gateway from the superior court action. The remaining defendants (Pledgors and Scott Robinson individually) did not dispute that the borrowed funds had not been fully repaid, but argued the Pledge Agreement was unenforceable after the nonjudicial foreclosure sale. Pledgors argued that statutory antideficiency protections precluded enforcement of the bank's secured interest because Pledgors had acted as sureties and had not waived their right to assert antideficiency protections, referred to as a *Gradsky* defense (see *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40, 41-42). The trial court found this defense inapplicable, granted CRE a directed verdict, and stated its intent to enter judgment in CRE's favor.

The original proposed judgment—filed on February 16, 2016—stated in relevant part: "[CRE] shall recover from [Pledgors] all of [their] *ownership* interests in Gateway Additionally, [*Pledgors and Gateway*] are hereby enjoined from selling, assigning, leasing, or otherwise transferring or disposing of any ownership interests in, or assets of, [Gateway]." (Italics added.) This initial judgment shall be referred to as the February 2016 judgment.

Shortly after, Pledgors argued the judgment had been prematurely filed before they had the opportunity to assert objections, and then challenged the judgment on two main grounds. First they argued the provision that "[CRE] shall recover [from Pledgors] all of [their] *ownership interests* in Gateway" was improper because the Pledge Agreement specifically defined Collateral to include only " '[a]ll right, title and interest in and to all of the *membership interests* in Gateway' " Pledgors thus asked the court to change the phrase "ownership interests" to "membership interests."

Second, Pledgors asked the court to delete the sentence enjoining them from " 'selling, assigning, leasing or otherwise transferring or disposing of any ownership interests in, or assets of, Gateway ' " Pledgors argued this provision was beyond the court's authority because CRE did not request injunctive relief in their pleadings or at trial. They argued the issue of any necessary injunctive relief could be addressed during postjudgment enforcement proceedings. Pledgors also argued this language would "improperly interfere with the affairs of [Gateway] and its non-debtor members."

CRE responded by asking the court to "overrule" Pledgors' objections and adhere to the proposed February 2016 judgment. On the first objection, CRE argued there was no substantive difference between Pledgors' "ownership" and "membership" interests, and the objections were asserted solely for delay. On the second objection, CRE argued injunctive relief was appropriate because the evidence at trial supported that Pledgors had violated, and were continuing to violate, CRE's rights to the security by transferring Gateway assets and/or interests in Gateway, and by continuing to permit Scott Robinson to act as Gateway's managing partner.

On March 3, 2016, the court issued a minute order "vacat[ing] the [February 2016] judgment" and stating that it "will now consider the timely filed objections to the proposed judgment."

About three weeks later, on March 23, 2016, the court filed an amended final judgment (referred to in this opinion as the March 2016 judgment), in which the court modified the earlier February 2016 judgment by adopting Pledgors' requested changes. First, the court changed the phrase "ownership interests" to "membership interests," as

requested by Pledgors. Second, the court deleted the sentence enjoining Pledgors from transferring "any ownership interests in, or assets of, Gateway" The court initialed both handwritten changes on the margin of the new judgment and re-signed the judgment on March 23, 2016. The final judgment now read: "[CRE] shall recover from [Pledgors] all of Pledgor Defendants' membership interests in Gateway"

Pledgors then filed a notice of appeal challenging this March 2016 judgment. The next year, in July 2017, this court filed an opinion affirming the March 2016 judgment. (*CRE I, supra*, D070549.) We held the trial court properly found CRE's right to the secured interest in the Pledge Agreement was enforceable "without regard to antideficiency statutory protections under section 580d." (*CRE I*, at p. 4.) CRE did not file a cross-appeal or otherwise challenge the wording of the March 2016 judgment.

Postjudgment Proceedings

After the remittitur issued in September 2017, CRE asked Pledgors' counsel when they would be transferring their interests in Gateway to CRE. Pledgors' counsel responded: "I am not totally certain about what it is you are asking for. Your client obtained a judgment against [Pledgors] awarding it my clients' membership interest in the Company. My clients have complied with that judgment since its entry, and intend to continue to do so in the future. If there is something further and specific that your client contends mine must do to comply with the judgment, please let me know what that is and we will consider your position."

On November 10, CRE's counsel wrote back stating CRE was requesting that Pledgors provide documents confirming the transfer of their Gateway membership

interests to CRE, "as well as all [of Gateway's] books and records" CRE's counsel noted that Pledgors "appear[] to have acted in contempt of the [March 2016] Judgment by continuing to assert dominion and control over [Gateway]," including appointing a new manager that was controlled by or associated with Pledgor Scott Robinson. CRE's counsel stated: "Please be advised that unless we are in receipt of all of the records and documents of [Gateway] . . . , which includes an affirmation from [Scott] Robinson that our client has succeeded to the interests in [Gateway] . . . , we will seek appropriate sanctions and other relief from the Court."

During the next month or two, the parties continued to dispute what Pledgors were required to do to comply with the March 2016 final judgment.

On January 3, 2018, an attorney (Michael Leone) wrote a lengthy letter purportedly on behalf of Gateway, asserting that CRE acquired only Pledgors' economic interests in Gateway, and not their voting rights. Leone supported this assertion with the March 2016 judgment's use of the phrase " 'membership interests' " (rather than "ownership interests") and relied on statutory and contractual rules providing that transfers of limited liability company (LLC) "membership" rights do not include voting rights without the express consent of all of the other LLC members. Leone stated that two other parties own membership interests in Gateway. Leone also asserted that the judgment did not divest Pledgors' right to select a new LLC manager, arguing that CRE "did not seek, or obtain, any form of declaratory relief in the Judgment that decreed [Gateway's] members were no longer empowered to exercise voting rights The only language in the original version of the Judgment that purported to restrict or inhibit

[Gateway] Members' ability to exercise control over [Gateway] was stricken from the version signed by the Judge."

The next day, CRE's counsel countered that Pledgors' new interpretation of the March 2016 judgment was unsupported. CRE's counsel stressed that Pledgors' representations in the Pledge Agreement made clear they had the authority to, and did, designate their entire interests in Gateway to be the security for the additional loan amounts. He also noted that even assuming the existence of two other members, Pledgors owned 81.7 percent of the LLC membership interests, and thus controlled the entity's management.

Pledgors' counsel responded that his clients were not acting on behalf of Gateway, but he could not confirm that Pledgors "will send to you all property of the entity." Pledgors' counsel said the March 2016 judgment did not require this act; Pledgors do not have the "unilateral power" to do so; and instead the Gateway manager has the sole authority over Gateway's assets.

Shortly after, on January 29, 2018, CRE filed an application with the court seeking an order (1) directing Pledgors "to turn over to [CRE] all property, books, and records of Gateway . . . ," and (2) requiring Pledgors to show cause why they should not be held in contempt. CRE submitted its attorney's declaration summarizing the facts set forth above. He emphasized that Scott Robinson was continuing to direct Gateway to engage in acts violating the March 2016 judgment, including by paying himself from Gateway assets, hiring attorneys for Gateway to oppose CRE's requests, and appointing a "new

manager" (GCG Manager, LLC (GCGM)) through which Robinson was exercising control and refusing to turn over Gateway's books, records, and property.

The court issued an order to show cause, requiring Pledgors to show why they are not in contempt of the court's March 2016 judgment.

In response, Pledgors filed papers arguing they were in full compliance with the judgment, explaining their "membership interests in Gateway were non-certificated" and therefore "there is not now, nor has there ever been, a physical document reflecting their membership interests. . . ." They stated they have "acknowledged that [CRE] now holds all of their economic interests in Gateway. . . . As such, Pledgors have not received nor requested any financial distribution from Gateway, nor have they asserted any right to any of the money or property held by Gateway." They each submitted declarations supporting these assertions.

Pledgors also argued a contempt order would be improper because CRE has not established beyond a reasonable doubt that Pledgors (1) violated a clear and narrowly drawn court order; (2) failed to comply with any portion of the March 2016 judgment (which did not include any injunctive relief); and (3) have the ability to comply with CRE's current demands. As to the third point, Pledgors argued that they are not Gateway's managers and thus do not exert any control over Gateway's daily management, and there are two other LLC members who did not pledge their membership interests in Gateway (Linda L. Dowdy Family Trust and Richard Robinson) and never approved the voting rights transfer (which Pledgors said was required for a valid transfer). Pledgors asserted that CRE has long been on notice (before the Pledge Agreement was executed

and during discovery in the underlying litigation) that there were other limited partnership members of Gateway.

March 9, 2018 Order Entering Prior Judgment Nunc Pro Tunc

On March 9, 2018, the court issued a lengthy minute order stating that after considering the submissions filed by both parties, it was taking the contempt hearing "off-calendar." The court said it would instead modify the March 2016 judgment to revert back to the initial February 2016 judgment. The court thus "vacated" the March 2016 judgment and entered the February 2016 judgment "nunc pro tunc."

The court explained its reasoning as follows:

"The court believes it was misled by [Pledgors] in their objections to the original [February 2016] judgment. Based on those objections, the court amended the judgment from awarding plaintiff 'ownership' interests in Gateway . . . to awarding plaintiff 'membership' interest in Gateway. The court was also convinced to delete a provision awarding injunctive relief to conform with the pleadings. . . .

"[Pledgors] signed [the Pledge Agreement] in which [they] warranted that they owned all membership interests in Gateway, as collateral to a loan. They also agreed that they would not, without consent of [CRE], assign or transfer any membership interest. They agreed that while the indebtedness was outstanding, 'P]ledgors 'shall be the sole members and manager of' Gateway. . . . Pursuant to a Change in Terms agreement signed by Robinson as Gateway's manager, Gateway as the borrower was hypothecating its ownership interest as additional collateral. . . . As stated by the Court of Appeal at p. 38, '[these agreements] . . . together were clearly intended to provide additional collateral beyond that which Gateway had already provided'

"The court has become aware that defendant Scott Robinson . . . without notice to [CRE], formed a new entity [GCGM]. After judgment, Robinson resigned as manager of Gateway and purported to appoint GCGM as Gateway's new manager without notice to [CRE]. [Pledgors] now contend there are other members of

Gateway in addition to [P]ledgors. [Pledgors] have refused to provide Gateway records, books and property to [CRE].

"It was not the intent of the court to facilitate [Pledgors'] use of the judgment as a means to avoid enforcement but it appears that is exactly what is occurring. The [March 2016] judgment does not reflect the express judicial intention of the court to award all interests in Gateway to [CRE]. (See, *In re Marriage of Kaufman* (1980) 101 Cal.App.3d 147, 151[.])

"Accordingly, the [Final] Judgment entered March 23, 2016 is vacated and the court enters judgment, nunc pro tunc, to the Judgment entered on February 16, 2016."

Four days later, Pledgors filed a notice of appeal challenging this March 9, 2018 order reinstating the previously vacated February 2016 judgment. Pledgors also filed a notice of statutory stay of the proceedings based on its filing of this appeal. (See § 916.)

Contempt Proceedings

The next month, CRE filed an ex parte application asking the trial court to reset the contempt hearing and to strike Pledgors' notice of a statutory stay. Regarding the stay, CRE argued contempt proceedings were appropriate based on a statutory exception to the automatic-stay rule for orders "direct[ing] the assignment or delivery of personal property." (See § 917.2.) Regarding the contempt motion, CRE filed its attorney's declaration, stating Pledgors continue to refuse to turn over Gateway's books, records, and property to CRE. CRE's attorney also said Scott Robinson was continuing to act on Gateway's behalf through the new manager, GCGM, and appeared to be paying himself with Gateway assets. CRE's attorney asserted that the *CRE I* court had previously ruled that CRE now owns 100 percent of Gateway and that CRE is Gateway's sole member.

Pledgors opposed the contempt motion, arguing the statutory appellate stay prohibits any further contempt proceedings relating to the rulings now on appeal. They also incorporated their prior response to the contempt application, and reiterated that they were acting properly because they were not the sole members of the Gateway LLC and CRE had long known that they did not own or control 100 percent of Gateway's interests and nonetheless elected not to include the additional members as defendants in the litigation. Pledgors argued the court lacked personal jurisdiction over the absent members and has no authority to adjudicate their interests in the entity. Pledgors also disagreed that the *CRE I* court had decided the enforcement-related issues, including Gateway's ownership status for purposes of enforcement proceedings.

June 19, 2018 Contempt Order

After considering these submissions and conducting a hearing, the court determined Pledgors were in contempt of the March 9, 2018 order and the reinstated February 2016 judgment.

In a June 19 written order, the court stated Pledgors "are knowingly, intentionally and continuing to disregard this Court's Orders and thus are in civil indirect contempt of court." (See §§ 1218, 1209, subd. (a)(5).) The court found that Scott Robinson's efforts to elect a " 'new' " manager for Gateway "was a sham," and that "under the guise of GCGM, Robinson continues to refuse to turn over Gateway's books, records, and property to CRE, despite CRE's repeated requests for those materials from [Pledgors] and Gateway directly." The court also stated that it "it appear[s] Robinson—acting through [GCGM]—is paying himself and others from Gateway assets, without any authority to do

so"; is retaining attorneys to oppose CRE's efforts to enforce the judgment; and is continuing to send emails on behalf of Gateway.

The court stated that its March 9 order entering the February 2016 judgment "nunc pro tunc" made "clear[]" and "unmistakabl[e]" the court's intent "to award CRE in this action" all of Gateway's interests, including its books and records. The court further stated: "Despite fair warning from this court in the March 9, 2018 Order and otherwise, [Pledgors] have continued to refuse to comply with the Judgment, affirmed by the Court of Appeal, which found that CRE is the sole member and only owner of Gateway, consistent with the terms of the Pledge Agreement [Pledgors] had the ability to comply and continued to have the ability to comply, but willfully chose not to comply. Instead, Mr. Robinson continues to hold himself out to third parties as the manager of Gateway with full right and authority to act on its behalf."

Based on these findings, the court imposed the following orders and sanctions:

"The court will impose sanctions of \$1,000/day from March 9, 2018 to the date of this hearing, June 14, 2018 in the amount of \$97,000 payable to the court. . . . [¶] [Pledgors] are directed to immediately deliver to counsel for CRE all books and records of Gateway and cease holding themselves out as agents or affiliates of Gateway, and ordered to pay CRE's attorney's fees and costs that were incurred due to Defendants' disregard for the Court's Orders. . . .

"Further, [Scott] Robinson shall deliver a writing affirming under oath that neither he nor GCGM owns, controls or holds any position with Gateway, and confirming and acknowledging that pursuant to judgment entered in favor of CRE, all interests in Gateway are owned by CRE. [¶] Defendants, and any counsel retained by [Pledgors], Robinson and/or GCGM are enjoined from acting on behalf of Gateway."

The court then stayed the sanctions award for three and one-half weeks. The court stated that once "all records are provided, and in any event by July 13, 2018, the \$97,000 in sanctions will be withdrawn. Should [Pledgors] fail to provide the above documents by July 13, 2018, the \$97,000 in sanctions shall be immediately due and owing to the court." The court also stated it would award reasonable attorney fees and costs "incurred in connection with the ongoing efforts to enforce the Judgment from and after the date of affirmance by the Court of Appeal" The court scheduled an August 17 hearing to determine the amount of the fees and costs.

On the deadline date for transferring the records (July 13, 2018) Pledgors filed a writ petition in this court requesting an "annul[ment]" of the contempt order and stay of the trial court proceedings pending the resolution of its appeal challenging the March 9, 2018 order modifying the earlier judgment. After this court issued an order to show cause, the trial court took the attorney fees issue off calendar pending the completion of this writ proceeding. The parties have additionally informed us that Pledgors have complied with the court's June 19 orders that they transfer Gateway's books and records and terminate any activities on behalf of Gateway.

DISCUSSION

Pledgors challenge the court's contempt award and sanctions. We determine the contempt order must be vacated based on California law prohibiting a civil contempt award unless the party has violated a valid, specific, and unequivocal order. In reaching this conclusion, we recognize the court's findings that Pledgors have not acted in good faith in responding to CRE's efforts to enforce the judgment. These findings, however,

do not justify a contempt order without the necessary prerequisites for imposing this severe remedy. In Part III, we briefly discuss the court's broad authority to order full enforcement of the judgment after resolving the parties' remaining contentions, and to sanction Pledgors if they do not comply with these orders.

I. *Legal Principles Governing a Contempt Proceeding*

"The willful refusal to obey a valid court order is an act of contempt." (*In re Marcus* (2006) 138 Cal.App.4th 1009, 1014 (*Marcus*); see § 1209, subd. (a)(5); *Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1548.) "The elements of proof necessary to support punishment for contempt are: (1) a valid court order, (2) the alleged contemnor's knowledge of the order, and (3) noncompliance." (*Marcus*, at p. 1014; *Koshak*, at pp. 1548-1549.) The contempt power should be used only when the factual predicates for its exercise are clearly shown. (*In re Jones* (1975) 47 Cal.App.3d 879, 881.)

A civil contempt proceeding is viewed as criminal in nature because of the potential penalties. (§ 1218, subd. (a); *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913; *Rickley v. Goodfriend* (2012) 207 Cal.App.4th 1528, 1537; *In re Witherspoon* (1984) 162 Cal.App.3d 1000, 1001.) As a result, many criminal constitutional protections apply in civil contempt proceedings, including the presumption of innocence and the beyond-a-reasonable-doubt proof standard. (*Witherspoon*, at pp. 1001-1002; *Farace v. Superior Court* (1983) 148 Cal.App.3d 915, 917-918; § 1218.) Additionally, a contempt finding must be based on the violation of an order that was clear, specific, and unequivocal. (See *Inland Counties Regional Center, Inc. v. Superior Court* (2017) 10 Cal.App.5th 820, 827; *Marcus, supra*, 138 Cal.App.4th at pp. 1014-1015.) In evaluating a contempt

adjudication, a reviewing court must determine whether "there was any substantial evidence before the trial court to prove the elements of the contempt." (*Marcus*, at p. 1015.)

II. *Analysis*

The court based its contempt award on its finding Pledgors violated the March 9, 2018 order reinstating the February 2016 judgment. This contempt finding was improper because the court had no authority to reinstate the February 2016 judgment and thus this judgment was invalid. Additionally, before issuing the contempt sanctions, the court had not issued a clear, specific, and unequivocal order informing Pledgors what they were required to do to comply with the final judgment.⁴

A. *Court Had No Authority to Reinstate the February 2016 Judgment*

" 'The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment.' " (*Wanke, Industrial, Commercial, Residential, Inc. v. Keck* (2012) 209 Cal.App.4th 1151, 1172.) A " 'void' " order includes an act beyond the court's jurisdiction and/or an act that violates the constitution, a statute, or court rule. (*Ibid.*)

A court has no authority to alter its own judgment outside the statutory time periods, except for clerical errors. "A court can always correct a clerical, as distinguished from a judicial[,] error which appears on the face of a decree by a *nunc pro tunc* order.

⁴ We reject Pledgors' alternate contention that the court had no jurisdiction to issue the contempt sanctions because they filed a notice of appeal from the March 2018 judgment before the contempt proceedings occurred. Generally, a notice of appeal of the underlying order divests a court of subject matter jurisdiction over contempt orders involving the underlying order. However, an exception applies for orders requiring the assignment or delivery of personal property. (§ 917.2.)

[Citations.] It cannot, however, change an order which has become final even though made in error, if in fact the order made was that intended to be made." (*Estate of Eckstrom* (1960) 54 Cal.2d 540, 544 (*Eckstrom*).) "The question presented to the court on a hearing of a motion for a *nunc pro tunc* order is: What order was in fact made at the time by the trial judge?" (*Ibid.*)

Thus, "[u]nless the challenged portion of the judgment was entered inadvertently, it cannot be changed post judgment under the guise of correction of clerical error." (*Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 117.) "[A]lthough clerical error may freely be corrected postjudgment, judicial error may be corrected only by normal procedures for attacking a judgment (motion for new trial, appeal, independent action in equity, etc.)." (*Ibid.*) "The test which distinguishes clerical error from possible judicial error is simply whether the challenged portion of the judgment was entered inadvertently (which is clerical error) versus advertently (which might be judicial error, but is not clerical error)." (*Ibid.*; see *Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138, 1144.) Generally a trial court's own findings on whether an error was clerical or judicial are entitled to "great weight" (*Estate of Doane* (1964) 62 Cal.2d 68, 71), but there must be at least some support in the record for its conclusion (see *Eckstrom, supra*, 54 Cal.2d at pp. 547-548).

In this case, the court modified the March 2016 judgment based on its view that certain portions of the judgment did not reflect its prior intent. However, the undisputed evidence shows the modified portions of the judgment were the result of deliberate, intentional, and knowing judicial determinations, and not clerical errors. During the 2016

proceedings, the court rejected the proposed February 2016 judgment, and instead adopted the March 2016 judgment favored by Pledgors. In doing so, the court had before it Pledgors' specific grounds for their objections and CRE's motion papers explaining its disagreement with these objections and urging the court not to modify the judgment. After reviewing these submissions, the court found Pledgors' objections were timely and stated it would consider the objections. Three weeks later, in March 2016, the court adopted Pledgors' requested changes; the changes were made through handwritten marks on the original judgment; and the court initialed each of these changes and re-signed the final judgment. These amendments amounted to intentional changes to the prior proposed judgment, and do not reflect that the court made a clerical error in adopting the March 2016 judgment, instead of the February 2016 judgment.

In its March 9, 2018 order, the court stated it believed it had the authority to correct the March 2016 judgment because it found (1) the March 2016 judgment did not "reflect the express judicial intention of the court to award all interests in Gateway to [CRE]"; and (2) it was "misled by [Pledgors] in their objections to the original judgment." Neither of these grounds shows the type of error that permits a court to later modify the judgment.

First, the fact that a judgment does not accurately reflect a subjective judicial intent to provide different or greater relief is not a clerical error. A judgment cannot be corrected on the ground it was not the judgment the trial court would have preferred to have made. (*Eckstrom, supra*, 54 Cal.2d at pp. 545-546; see *Hamilton v. Laine* (1997) 57 Cal.App.4th 885, 891.) " 'A nunc pro tunc order is not appropriate to rescue subjective

judicial intentions when a judge failed in any way to act on those intentions in entering judgment.' " (*Hamilton*, at p. 891.)

Second, the fact that the court believed it was "misled" by Pledgors does not establish a clerical error. "If the court misconstrued the evidence before it, or misapplied the law applicable to the facts disclosed by the evidence, *or was even misled by counsel*, such an error was in no sense a clerical error which could thereafter be corrected by the court upon its own motion or in any proceeding except on motion for a new trial." (*Lankton v. Superior Court* (1936) 5 Cal.2d 694, 696, italics added.) The time for determining the merits of the parties' arguments is when the court has jurisdiction over the matter. Once a judgment is entered and statutory postjudgment time for challenging the judgment has expired, a court does not retain jurisdiction to correct language in the judgment based on the court's later understanding of the impact of the parties' arguments.

This is not a situation in which the court intended to pronounce judgment in one way, but the entered judgment did not reflect that intent. Rather, this situation occurred because the court later realized that the manner in which it intended to (and did) enter judgment was making it more difficult for the prevailing party to enforce the judgment. Changing the wording of a judgment two years later to allow stronger or better enforcement of a judgment does not reflect correction for a clerical error; rather it is an impermissible change for judicial error.

The court's reliance on *In re Marriage of Kaufman* (1980) 101 Cal.App.3d 147 was misplaced. In *Kaufman*, the trial court had approved a stipulation between husband and wife, and expressly made the stipulation an order of the court. (*Id.* at pp. 149-150.)

However, the court inadvertently signed a judgment modifying certain terms of the stipulated agreement. (*Ibid.*) On a motion two years later by the husband, the court corrected the judgment to conform to the stipulation and order of the court. (*Ibid.*) The reviewing court upheld these changes, explaining that "[w]hen a signed judgment does not reflect the express judicial intention of the court, the signing of the judgment involves clerical rather than judicial error." (*Id.* at p. 151.)

The situation here is different because there is no showing the court intended to make the earlier proposed February 2016 judgment the final judgment. Instead, the undisputed evidence shows that the court intended the change and intended to enter the March 2016 judgment. The fact the court may not have fully appreciated all possible consequences of the wording changes does not convert the court's ruling into a clerical error.

B. *No Clear Specific Unequivocal Order*

CRE contends that even if the nunc pro tunc judgment was void and the portion of the March 9, 2018 order vacating the March 2016 judgment was invalid, we should uphold the contempt finding and the imposition of sanctions because the court's findings were supportable under the language of the court's March 2016 judgment or in other court orders. CRE asserts there is no substantive difference between the February 2016 judgment and the March 2016 judgment because "membership" and "ownership" interests have equivalent meanings in the LLC context.

These arguments do not provide a valid basis to uphold the contempt order. Neither the March 2016 judgment nor the March 9, 2018 order included a specific

statement on the manner in which Pledgors were required to comply with the judgment or orders. For example, there was no order prohibiting Pledgors from taking any action regarding their Gateway shares, nor were there any orders affirmatively requiring Pledgors to transfer all of Gateway's books and records to CRE. Additionally, there was no resolution of the disputed issue of whether "membership" interests included voting rights (as the court enforced only the February 2016 order that did not raise this issue).

"[P]unishment [for contempt] can only rest upon clear, intentional violation of a specific, narrowly drawn order. Specificity is an essential prerequisite of a contempt citation." (*Wilson v. Superior Court* (1987) 194 Cal.App.3d 1259, 1273.) Thus, " 'the acts constituting the contempt must be clearly and specifically prohibited by the terms of the injunction.' " (*Weber v. Superior Court* (1945) 26 Cal.2d 144, 148.) "[T]he 'party bound by an injunction must be able to determine from its terms what he may and may not do; he cannot be held guilty of contempt for violating any injunction that is uncertain or ambiguous. . . . Unless there is a violation of the terms of the injunction or temporary stay, an order adjudging a party guilty of contempt for violating its provisions is in excess of the court's jurisdiction." (*Ibid.*, citation omitted.)

The relevant terms of the March 2016 judgment awarded Pledgors' "membership interests" in Gateway to CRE, but there was nothing in this judgment requiring Pledgors to take any affirmative action or to refrain from any actions. Likewise, the March 9, 2018 order states that the court did not intend defendants to use the judgment as a means to avoid enforcement, but does not specifically identify what Pledgors must do to comply with the judgment.

The court found Pledgors in contempt based on Scott Robinson's activities in continuing to act on behalf of Gateway and for failing to transfer all of Gateway's assets and records to CRE. However, there was no provision in any order or judgment (before the contempt order was filed) declaring CRE was the sole owner of Gateway, and/or directing Scott Robinson or any of the other Pledgors to deliver any specific LLC property or assets to CRE.

III. Further Proceedings

We shall order the court to vacate its June 19 contempt order, vacate the nunc pro tunc judgment, and reinstate the March 2016 judgment.

This determination does not mean the court cannot fully enforce the March 2016 judgment by issuing postjudgment enforcement orders. Based on the March 2016 judgment, these orders may potentially include requirements that: (1) Pledgors fully transfer their interests and related rights in Gateway to CRE; (2) Pledgors turn over any of Gateway's assets in their possession; (3) a monitor be appointed to oversee the transfer of these interests (an express remedy in the Pledge Agreement); (4) Pledgors be prohibited from acting on behalf of Gateway; and/or (5) Pledgor Scott Robinson be required to deliver a written affirmation that neither he nor any entity he owns or controls is engaging in any acts on Gateway's behalf or receiving any interest or profits on Gateway's behalf. Once these orders are properly issued, Pledgors must comply with them and, if not, may be subject to contempt and related sanctions.

Whether enforcement of the March 2016 judgment properly includes a transfer of voting rights is not an issue before us at this time (because the court has not yet ruled on

this issue). We note only that based on their express representations made in the Pledge Agreement, Pledgors' current position that the enforceable security interest does not include all *their* interests in Gateway (including voting rights) *because* all LLC members did not expressly consent to this transfer would appear to be questionable at best.

Likewise, whether enforcement of the judgment properly includes an order that CRE now owns one hundred percent of Gateway is not an issue before us at this time. We note only that suggestions in the proceedings below that we ruled on this issue in *CRE I* are not well taken. Although we rejected Pledgors' argument in their reply brief that the Pledge Agreement was not enforceable because all LLC members did not sign the Pledge Agreement (*CRE I, supra*, D070549), this is not the same issue as the current ownership status of Gateway. In *CRE I*, we ruled on the issue whether the security interest in the Pledge Agreement was enforceable despite the prior nonjudicial foreclosure sale. We did not address the issue regarding the scope of CRE's ownership rights in Gateway *for purposes of enforcing the judgment*.

On the other hand, we find unavailing Pledgors' attempts to avoid enforcement of the judgment because of their claims that two owners hold a minority of interests (less than 15 percent) in the Gateway entity. To the extent that third party interests are implicated by a court's enforcement order, the third parties would have the right to assert these interests in any enforcement proceedings. But Pledgors have no standing to assert these third party interests as a basis to avoid transfer of their own interests.

Based on the final March 2016 judgment, CRE has the right to recover from Pledgors *their* interests in Gateway. The court has the full authority—on a proper record—to order those interests transferred in a manner that fully enforces the judgment.

DISPOSITION

Let a writ of mandate issue commanding the superior court to (1) vacate its June 19, 2018 contempt order; (2) reinstate the March 23, 2016 final judgment; and (3) vacate the nunc pro tunc judgment (entered on March 9, 2018). The parties are to bear their own costs in this writ proceeding.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

GUERRERO, J.